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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

LEARLEY REED GOODWIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the prosecutor's decision to increase charges against respondent may properly be characterized as "vindictive" prosecutorial action in violation of the Due Process Clause merely because it occurred after respondent elected to be tried by jury.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 637 F.2d 250. The order of the court of appeals denying rehearing (App. C, *infra*, 17a) is not reported. The opinion of the district court (App. D, *infra*, 18a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 16a) was entered on January 9, 1981. A petition for rehearing was denied on April 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] The petition is 11 days out of time under Rule 20.1 of the Rules of this Court. Due to a clerical error in the docketing of the case in the Department of Justice, the date of the court of appeals' denial of rehearing was mistakenly recorded as April 29, 1981, rather than April 16, 1981. Accordingly, the

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, respondent was convicted of forcibly assaulting a federal officer, in violation of 18 U.S.C. 111, and of fleeing from a police officer, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. § 21-904 (1977). He was sentenced to consecutive terms of five years' imprisonment on the assault count and one year's imprisonment on the flight count. On appeal, a panel of the Fourth Circuit reversed respondent's felonious assault conviction, finding that the charge had impermissibly been brought after respondent invoked his right to be tried by jury on certain misdemeanor and petty offense charges that previously were filed against him.

1. On the evening of February 2, 1976, the vehicle that respondent was driving was stopped for speeding by U.S. Park Policeman James Morrissette

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government planned to file the instant petition on June 26, 1981, within the 60 day period specified in the Court's rules. The clerical error was not discovered until June 24, at which time it was too late to move for an extension of time to file the petition under Rules 20.1 and 29.2. We note that the instant petition is being filed well within the maximum 90-day period allowed under Rule 20.1 for criminal cases in which an extension is granted. The time limit prescribed in Rule 20.1 is not jurisdictional. See R. Stern & E. Gressman, *Supreme Court Practice* 389-393 (5th ed. 1978) (collecting decisions of this Court). The delay in filing the instant petition can cause no prejudice to respondent, and, due to the Court's summer recess schedule, will not result in delay in acting on the petition or, should certiorari be granted, in deciding the case. We also note that this is the only case since *United States* v. *Mazurie*, 415 U.S. 947 (1974), 419 U.S. 544 (1975), in which the government has asked the Court to consider an untimely petition in a criminal case. In view of the important constitutional issue presented in this case, we respectfully urge the Court to waive the time limit in Rule 20.1 and to consider the petition on the merits.

on the Baltimore-Washington Parkway (C.A. App. 91-108).[2] Both respondent and Officer Morrissette got out of their automobiles and walked to the passenger side of respondent's car. After checking respondent's driver's license, Officer Morrissette shined his flashlight into the car and asked respondent to lift the armrest on the front seat of the car. Respondent entered the car, placed it into gear, and rapidly accelerated. As the car started forward, it "fish-tailed," striking Officer Morrissette and knocking him onto the back of the car and then into the highway (*id.* at 100-101). When the officer recovered himself, he returned to his car and, with lights flashing and siren sounding, pursued respondent at speeds reaching 95 miles per hour. Respondent nonetheless eluded the officer in heavy traffic (*id.* at 101-103). The following day, Officer Morrissette filed a complaint in the United States District Court for the District of Maryland at Hyattsville, charging respondent with several misdemeanor and petty offense counts, including the misdemeanor count of "assault by striking" a police officer, in violation of 18 U.S.C. 113(d) (App. A, *infra*, 2a; C.A. App. 53).[3]

Respondent thereafter was arrested on March 11, 1976, and was arraigned before the United States Magistrate in Hyattsville. After a preliminary hearing, the case was set for trial on April 29, 1976. Be-

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[2] "C.A. App." refers to the joint appendix in the court of appeals.

[3] The other charges contained in the complaint were as follows: two counts of speeding, in violation of 36 C.F.R. 50.31; one count of reckless driving, in violation of 36 C.F.R. 50.32; one count of failing to give aid at the scene of an accident, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. §§ 20-102 and 20-104 (1977); and one count of fleeing from a police officer, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. § 21-904 (1977) (C.A. App. 53).

fore that time, however, respondent fled the jurisdiction. He also failed to appear for trial (App. A, *infra*, 2a-3a). Respondent remained absent from the jurisdiction for over three years, after which Virginia state correctional authorities returned him to Maryland (C.A. App. 66-67).

2. Upon his return to Maryland, respondent's case was assigned to Ms. Blanche Bruce, an attorney from the Antitrust Division of the Department of Justice who temporarily was detailed in Hyattsville to try petty crime and misdemeanor cases before the magistrate. Ms. Bruce performed that duty for a two-week period, during which she was authorized to try complaints filed by law enforcement officers (C.A. App. 110-112). She did not have authority to try felony cases, to seek indictments from the grand jury, or to file informations.

On May 24, 1979, Ms. Bruce was "approached" by respondent's attorney, who "asked if the Government would consider a plea" (C.A. App. 111). Ms. Bruce expressed interest in the proposal, but respondent later advised counsel that he did not wish to plead guilty and desired a trial by jury before the district court. It is stipulated that, at this point, "none of the parties in any way considered the fact that a[] [felony] indictment might or could be brought" against respondent (*ibid.*).

After respondent pleaded not guilty and requested a jury trial, the case was transferred to the district court in Baltimore and was assigned to Assistant United States Attorney Edward Norton. As part of his pretrial preparation, Norton carefully reviewed the file and interviewed Officer Morrissette. He also conducted an independent investigation into respondent's background. His research disclosed that respondent appeared to be involved on a continuing basis in serious violent misconduct and drug-related

crimes. In view of those facts, Norton obtained a four count indictment on July 3, 1979, charging respondent with one felony count of forcibly assaulting a federal officer, in violation of 18 U.S.C. 111, and three related counts arising out of the same incident (App. E, *infra*, 30a-31a; C.A. App. 1, 7-14). As previously noted, respondent was convicted after a jury trial on one felony count of forcibly assaulting Officer Morrissette and on one misdemeanor count of fleeing to evade arrest.

3. Following the jury's verdict, respondent moved to dismiss the felonious assault count of the indictment, contending that the charge gave rise to an impermissible "appearance of retaliation" (C.A. App. 59).[4] Although respondent did not "assert actual vindictiveness on the part of the Government" (*id.* at 56), he claimed that Prosecutor Norton's decision to increase charges after he invoked his right to trial before the magistrate generated an "apprehension of retaliation" (*id.* at 57, 60). In response to that motion, Prosecutor Norton filed an affidavit (App. E, *infra*, 25a-32a) explaining his decision to seek a felony charge. The affidavit stated that Norton's investigation of respondent disclosed that, after the initial charges were lodged by Officer Morrissette, respondent had fled to California, where he had been imprisoned for violating the laws of that State (*id.* at 26a). Norton also learned that respondent recently had been tried and convicted in Virginia for attempting to shoot a police officer and for possession of over 500 $20 bags of heroin (*id.* at 29a). Officer Morrissette advised Norton that respondent had committed perjury at his preliminary hearing in Hyattsville, prior

[4] Despite the fact that respondent's dismissal motion was untimely under Fed. R. Crim. P. 12(b), (f), the district court found good "cause" for the delay (App. D, *infra*, 19a-20a) and considered the motion on the merits.

to his flight from the jurisdiction (*id.* at 27a-28a). Morrissette also informed Norton that respondent was known to the federal Drug Enforcement Administration and the Washington, D.C. police as a major heroin dealer (*id.* at 28a) and was associated with two persons who smuggled heroin from Mexico and distributed it in Florida, Georgia, and Maryland (*ibid.*).

The prosecutor then summarized the facts that caused him to obtain a felony indictment as follows (App. E, *infra*, 30a-31a):

> First, I considered Mr. Goodwin's conduct on February 2, 1976 to be a serious violation of law. He had intentionally resisted a United States Park police officer in the performance of his duties, striking the officer with an automobile, leaving him perhaps seriously injured on the highway, and fleeing through traffic at a high rate of speed, thus endangering the lives of other drivers.
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> Second, among the documents I received in the Court file from Magistrate Burgess was a copy of Goodwin's FBI record. That record showed Mr. Goodwin's lengthy history of violent crime.
>
> Third, based on my conversations with Officer Morrissette and Assistant [Virginia] Commonwealth[] Attorney Jones, I judged Goodwin's conduct on February 2, 1976 to be related to major narcotics transactions.
>
> Fourth, I believed Mr. Goodwin had committed perjury in his testimony under oath at the preliminary hearing before Magistrate Burgess on March 30, 1976.
>
> Fifth, subsequent to the filing [of] the initial complaint on February 3, 1976, Mr. Goodwin had failed to appear for a trial scheduled for April 29, 1976.
>
> In summary, my decision to seek an indictment charging Mr. Goodwin with two felonies,

> 18 U.S.C. 111 and 18 U.S.C. 113[(c)], was based upon the totality of the circumstances set forth above and upon my judgment that his conduct on February 2, 1976 involved not merely a traffic incident on the Baltimore-Washington Parkway but also serious violations of federal law committed by a dangerous individual. My decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for a trial by jury in the United States District Court.

4. At respondent's request (C.A. App. 79, 109-112), the district court held a hearing on the issue of vindictive prosecution.[5] Following that hearing, the district court found (App. D, *infra*, 22a) that "the prosecutor in this case has adequately dispelled any appearance of retaliatory intent." The court noted that the prosecutor "did not receive all the information relating to the charges against Mr. Goodwin until June 11, 1979" and "did not read the information and seek an indictment until some time thereafter." The court added that "the Assistant U.S. Attorney in this case did not know of the Defendant's prior record until after the Defendant requested a jury trial. Since the prosecutor was not aware of the additional information on which the indictment was based until after the May 24th proceedings before Magistrate Burgess [the proceedings in which respondent requested a trial by jury], it appears far less likely that he was motivated by any vindictiveness" (*id.* at 22a-23a). Finally, the district court rejected respondent's assertion that the indictment should be conclusively presumed to be vindictively motivated simply because it was theoretically

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[5] At the hearing, the district court considered stipulated facts, affidavits, briefs and oral argument addressed to the issue of prosecutorial vindictiveness.

possible for the prosecutor to obtain all of the relevant information about respondent's background before respondent exercised his right to trial (*id.* at 23a):

> The Defendant intimates that because the Government had *access* to all pertinent information prior to May 24, 1979, since a representative of the Antitrust Division of the Department of Justice was appointed for a two-week tour of duty before Magistrate Burgess in the prosecution of misdemeanors and petty offense type cases, that the impermissible appearance of vindictiveness remains. However, the case law does not imply, and the due process clause does not require, that the prosecutor carry such a heavy burden of acquiring all information which is potentially available to him at a given time.

5. A divided panel of the court of appeals reversed respondent's felony conviction (App. A, *infra*, 1a-15a). The court initially stated that, "[o]n this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment" (*id.* at 4a). Although finding no actual vindictiveness, the majority ruled that there was an appearance of vindictiveness since the filing of the felony charge followed respondent's decision to stand trial (*id.* at 5a-6a). The court of appeals stated that "the due process clause protects a defendant from both actual vindictiveness and the fear of retaliation for exercising" a procedural right (*id.* at 4a-5a). The court added that "the *fear* of prosecutorial vindictiveness, as well as *actual* vindictiveness," has a "chilling effect" on the exercise of procedural rights, and therefore is protected against under the Due Process Clause (*id.* at 5a; emphasis in original).

The court of appeals distinguished this Court's decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357

(1978), which had held that a prosecutor may threaten a defendant with increased charges during plea negotiations and "up the ante" if the defendant insists on his right to stand trial. The court noted that, in this case, in contrast to *Bordenkircher*, respondent was not expressly threatened with increased charges if he elected to stand trial. The court reasoned that the absence of a threat indicated that a due process violation could be found to exist here while it was not found in *Bordenkircher* (App. A, *infra*, 6a-8a).

Finally, the court ruled that the prosecutor could not rebut the appearance of vindictiveness unless he presented evidence showing that "the increased charges could not have been brought before the defendant exercised his rights" (App. A, *infra*, 10a). The court stated that "[l]est exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, * * * at least where there [was] no showing that the charges could not have been brought before defendant made his election for a jury trial" (*id.* at 6a). The court expressed disagreement with decisions of other circuits that allow a "more far-reaching inquiry" into the issue of prosecutorial vindictiveness (*id.* at 9a n.1).

Judge Widener dissented (App. A, *infra*, 14a-15a). He concluded that the prosecutor's filing of increased charges in the present case, after plea negotiations broke down, was a fortiori proper under this Court's decision in *Bordenkircher* (*ibid.*):

> As the majority correctly notes, *Bordenkircher* "held that a prosecutor does not violate due process by threatening to increase charges in the

course of plea bargaining and then following up on that threat after plea negotiations break down." * * * Applying *Bordenkircher* to our case, if the government had threatened to prosecute Goodwin for assaulting the officer during the plea negotiations which did take place, and then had indicted Goodwin for that crime when the plea negotiations broke down, such conduct would have been approved under *Bordenkircher*. But because of the lack of a threat by the prosecutor to indict, the majority sets aside the conviction because "the circumstances surrounding the felony indictment [the assault on the officer] give rise to a general risk of retaliation." * * * The court now holds that while an expressed threat of retaliation will not suffice to set aside a conviction because of *Bordenkircher*, merely a general risk of retaliation without the expressed threat will suffice. If we analyze what the prosecutor did in *Bordenkircher*, we see that in that case he deliberately threatened the defendant with indictment for an additional offense in order to discourage trial, and to encourage a guilty plea, and the prosecutor expressly so advised the defendant before trial. * * * In our case, there is no intimation that the prosecutor was acting with vindictiveness in seeking the indictment for assaulting the officer, and the majority so finds. * * * Neither did he make any attempt to discourage any exercise of Goodwin's right to trial by jury. Thus, what the majority now adopts is a *per se* rule, the effect of which is that a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way.

REASONS FOR GRANTING THE PETITION

1. This case presents important questions under the Due Process Clause concerning the circumstances under which a prosecutor may properly seek new and increased charges against a criminal defendant who previously has exercised some procedural right. The court of appeals has ruled that a prosecutor may not prefer increased charges against a defendant—no matter how well justified those charges are—unless the prosecutor establishes that the charges could not have been preferred prior to the defendant's exercise of a procedural right. That ruling is based on a serious misreading of this Court's decisions in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and conflicts with decisions of several other courts of appeals.

In *Blackledge* v. *Perry*, *supra*, this Court held that the Due Process Clause barred a prosecutor from obtaining increased charges against a defendant who pursued his statutory right to a trial de novo. The Court found a "realistic likelihood" of vindictiveness in the case before it, since the prosecutor had "a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo * * *." 417 U.S. at 27. Since *Perry* was decided, there has been a proliferation of cases in which claims of "prosecutorial vindictiveness" have been asserted. While *Perry* and its progenitor, *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), involved post-trial increases in charge or sentence, the lower courts often have accepted vindictive prosecution claims arising, like this one in the instant case, during the pretrial phase of criminal cases. At that stage of a criminal proceeding, prosecutors are engaged in trial preparation and are continuously receiving new information that may affect their view as to the proper charges to be pressed against the

defendant. Likewise, accused persons are continuously exercising various procedural rights under the Constitution, federal statutes, the Federal Rules of Criminal Procedure, and local district court rules. Defense counsel have had no difficulty in connecting a prosecutor's enhancement of the charges against the accused (or a prosecutor's taking of other action contrary to the interests of the accused) with the accused's exercise of a procedural right, and repeatedly have filed pretrial dismissal motions and have demanded hearings based on claims of "vindictive prosecution." [6] The difficulties created by pretrial

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[6] We collect below only a few recent examples of such claims, described in the reported opinions of the courts of appeals. See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 646 F.2d 384 (9th Cir. 1980) (claim that a superseding indictment was a vindictive response to a motion to change venue); *United States* v. *Shaw*, No. 80-1329 (9th Cir. Mar. 2, 1981) (claim that the prosecutor's motion to set aside a guilty plea was a vindictive response to a defense motion for arrest of judgment); *United States* v. *Schiller*, No. 79-1206 (D.C. Ct. App. Oct. 21, 1980) (claim that increased charges were the result of a defense motion for consolidated trial); *United States* v. *Herrera*, 640 F.2d 958 (9th Cir. 1981) (claim that prosecutor's decision to try defendant on original charges after plea bargaining broke down was vindictive); *United States* v. *Burt*, 619 F.2d 831 (9th Cir. 1980) (claim that reindictment was a vindictive response to the defendant's suppression motion in a prior proceeding); *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980) (claim that second indictment was a vindictive response to motion to dismiss first indictment); *United States* v. *Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980) (claim that superseding indictment was a vindictive response to demand for jury trial); *United States* v. *Shaw*, 615 F.2d 251 (5th Cir. 1980) (claim that a superseding information was a vindictive response to defense request to transfer case to a different magistrate); *United States* v. *Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc) (claim that superseding indictment was a vindictive response to a request for bail); *United States* v. *Gardner*, 611 F.2d 770

claims of vindictive prosecution have been greatly compounded by frequent defense efforts to obtain interlocutory review of such claims in the courts of appeals.[7]

In view of the frequency with which claims of prosecutorial vindictiveness are litigated in criminal

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(9th Cir. 1980) (claim that second indictment was a vindictive response to defense request for trial and exercise of "right" not to cooperate with the government); *United States* v. *Black*, 609 F.2d 1330 (9th Cir. 1979) (claim that new indictment was a vindictive response to defense motion to vacate guilty plea); *United States* v. *Thomas*, 593 F.2d 615 (5th Cir. 1979) (claim that additional charges were the result of defense motion seeking clarification of the indictment); *Chapman* v. *Estelle*, 593 F.2d 687 (5th Cir. 1979) (claim that prosecutor's refusal to engage in plea bargaining was a vindictive response to defendant's motion to set aside guilty plea); *United States* v. *Stacey*, 571 F.2d 440 (8th Cir. 1978) (claim that indictment was a vindictive response to defendant's effort to obtain return of confiscated evidence); *United States* v. *Groves*, 571 F.2d 450 (9th Cir. 1978) (claim that increased charges were a vindictive response to a dismissal motion under the Speedy Trial Act); *United States* v. *Sturgill*, 563 F.2d 307 (6th Cir. 1977) (claim that second information was a vindictive response to defendant's request to be tried by a judge rather than a magistrate); *Hardwick* v. *Doolittle*, 558 F.2d 292 (5th Cir. 1977) (claim that new charges were a vindictive response to defense efforts to remove case to federal court); *United States* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977) (claim that increase in charges was a vindictive response to "possible motions" by the defendant).

[7] The Ninth Circuit, which allows interlocutory review of vindictive prosecution claims, recently observed in *United States* v. *Wilson*, 639 F.2d 500, 502 n.1 (1981): "Delay, disruption of calendars, loss of jury time, and needless expense follow in the wake of these interlocutory appeals. [D]efense attorneys, as advocates, * * * [have] added 'vindictive prosecution' to their check list of possible strategy for delay, continuance, severance, or dismissal. The resulting outpouring of motions was predictable."

cases in the district courts, and in view of the harmful effect that an unduly expansive interpretation of the vindictive prosecution doctrine would have in the pretrial context, this Court should provide further guidance to the lower courts by granting the petition in this case. If allowed to stand, the decision of the Fourth Circuit will prevent prosecuting attorneys from fulfilling their public responsibility to prefer appropriate charges against criminal defendants after a procedural right has been exercised by the defense, and will impair the government's ability to rebut claims of prosecutorial vindictiveness in an ever increasing number of cases. The practical consequence of the rule embraced by the majority of the panel, as Judge Widener correctly noted (App. A, *infra*, 15a), is that "a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way." The Due Process Clause should not be interpreted to produce that undesirable result.

2. As Judge Widener observed in his dissenting opinion in the court below (App. A, *infra*, 14a-15a), the result reached by the majority in this case cannot reasonably be reconciled with *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). In *Bordenkircher*, this Court held that it was permissible for a prosecutor to threaten the accused with increased charges for the purpose of encouraging the accused to waive his right to trial, and thereafter to significantly enhance charges in response to the accused's decision to stand trial. There was no doubt in *Bordenkircher* that the prosecutor threatened the increase in charges to discourage the defendant from exercising a constitutional right, and that the prosecutor "upped

the ante" in direct response to the exercise of that right. See 434 U.S. at 361 & n.7.

In the present case, in contrast, the prosecutor made no attempt to threaten the accused or to dissuade him from exercising a constitutional right. Moreover, as both the district court and the court of appeals agreed, the prosecutor's addition of charges against the accused was not a vindictive response to the exercise of any right. See App. A, *infra*, 4a: "On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment." Thus, even though no effort was made to discourage the exercise of any right and the addition of charges was not in retaliation for the invocation of such a right, the court of appeals found a violation of the Due Process Clause.

We submit that it is a fundamentally misguided conception of the Due Process Clause that would command dismissal of valid criminal charges in cases in which there is no discernible element of threat or retaliation. Indeed, it is no exaggeration to say that, following the decision of the court of appeals, a prosecutor is free to threaten increased charges and raise charges in direct response to a defendant's exercise of the right to stand trial, but may not increase charges in response to the receipt of new information unless he first threatens the accused and attempts to coerce a waiver of that constitutional right. This illogical result should not be countenanced. On the facts of this case, the Court's observation in *Bordenkircher* (434 U.S. at 364) should apply a fortiori:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

3. The major premise of the court of appeals' finding of a due process violation was its perception that respondent may have experienced a "fear of prosecutorial vindictiveness," which could "chill" the exercise of his right to stand trial (App. A, *infra*, 5a-6a). This Court's decisions establish, however, that due process violations lie "not in the possibility that a defendant might be deterred from the exercise of a legal right * * *, but rather in the danger that the State might be retaliating against the accused." *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 363. See also *Corbitt* v. *New Jersey*, 439 U.S. 212, 218 (1978) ("not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid").[8] Accordingly, this Court has held that the Due Process Clause is not violated in the absence of "a realistic likelihood of 'vindictiveness'" (*Blackledge* v. *Perry*, *supra*, 417 U.S. at 27), or a "real threat of vindictiveness" that is more than "de minimis" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 26, 28 (1973)).[9] There is no realistic likelihood of vindictiveness in a case such as this.

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[8] In this case, there is not the slightest evidence that respondent's exercise of any procedural right was "chilled" by the prosecutor's actions. Respondent insisted on his right to stand trial and received a trial on the merits. Thus, respondent "was not himself 'chilled' in the exercise of his right [to stand trial] * * * and we doubt that the 'chill factor' will often be a deterrent of any significance." *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 33 (1973).

[9] "Put another way, the mere appearance of vindictiveness is not enough. * * * [T]he factual situation must pose a realistic likelihood of vindictiveness." *United States* v. *Andrews*, 633 F.2d 449, 455 (6th Cir. 1980) (en banc). The standard, moreover, is "an objective one." It "does not depend on a defendant's subjective impressions." *Id.* at 454.

For the same reasons that the court of appeals found that there was not actual vindictiveness, there also was no realistic likelihood of vindictiveness. First, the prosecutor never threatened the accused with increased charges. If the prosecutor had in fact desired to chill the exercise of respondent's right to stand trial, he would have threatened respondent with an increase in charges to obtain a waiver of the constitutional right. Second, the hearing before the district court showed that the event that precipitated the increase in charges was the prosecutor's discovery of new information bearing on the severity of respondent's criminal behavior. The prosecutor who preferred the increased charges never engaged in plea discussions with the accused.[10] Finally, the original charges that the prosecutor deemed to be inadequate were charges filed by a police officer, not charges preferred by an attorney. The prosecutor who preferred the increased charges was informed of material facts that were unknown when the police officer filed the original charges.[11] In these circumstances, the rule announced by the Sixth Circuit in *United States* v. *Sturgill*, 563 F.2d 307, 309-310 n.3 (1977), has direct application:

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[10] Ms. Bruce, the original prosecuting attorney who appeared before the magistrate, merely responded to a *defense inquiry* about a possible guilty plea. The successor prosecutor, Mr. Norton, did not even discuss the possibility of a guilty plea. And it was Mr. Norton, not Ms. Bruce, who evaluated the case as part of his pretrial preparation and decided to obtain a felony count nearly six weeks after respondent elected to stand trial.

[11] For example, the prosecutor who obtained the felony count relied heavily on the fact that the accused committed perjury and fled the jurisdiction to evade trial *after* the original charges were lodged by the police officer. See App. E, *infra*, 31a.

> The original complaint was signed by a supervisory security assistant at the Naval Ordnance Station. * * * [W]e think that additional charges in the information would probably be justified, even if the potential sentence was significantly increased. To hold otherwise would unduly restrict the prosecuting attorney from making an independent examination of the criminal conduct and substituting his formulation of the appropriate charges in place of the lay person's. In such a situation it does not appear that there is a "realistic likelihood of vindictiveness."

4. Finally, even if any residual appearance of vindictiveness existed on this record, the prosecutor completely rebutted that appearance. The showing that he made, which was not contradicted by respondent, dispelled any suggestion of retaliation or vindictiveness. The prosecutor stated in his affidavit that respondent's decision to stand trial was not even considered in seeking enhanced charges. The enhanced charges were required by the gravity of respondent's misconduct, his long history of violent crime, his continuing involvement in major narcotics violations, his perjury before the magistrate, and his flight from Maryland to evade trial.

As this Court previously has held, the appearance of vindictiveness is adequately dispelled if nonvindictive reasons for the challenged conduct "affirmatively appear." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 726; *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n.7. See also *Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 223 ("We discern no element of retaliation or vindictiveness against Corbitt for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a

constitutional right"). Thus, assuming that respondent made out a prima facie claim calling for some explanation by the prosecutor of his actions, the requirement that non-vindictive reasons "affirmatively appear" was fully satisfied in this case.

It is essential that, during the pretrial phase of a criminal case, the prosecutor enjoy reasonable latitude to rebut charges of "vindictiveness" raised by defendants. During the pretrial phase of a criminal case, prosecutors frequently receive additional information requiring a modification of the charges originally preferred. At the same time, the accused frequently exercises a variety of procedural rights under the Constitution, federal statutes, the Federal Rules of Criminal Procedure, and local rules of court. If the prosecutor is not afforded reasonable latitude to explain that an increase in charges (or other action contrary to the interests of the defendant) is independent of the defendant's exercise of a procedural right, the defendant's invocation of such a right will serve as a blanket immunity sheltering him from additional criminal charges however well founded. While a defendant arguably is entitled to expect to be free from actual retaliation (but see *Bordenkircher* v. *Hayes*, *supra*), he has no legitimate expectation of freedom from enhanced charges based on newly discovered information or a reappraisal of his case in light of additional indications of dangerousness to society.[12]

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[12] The practical consequences of an expansive interpretation of the "vindictive prosecution" doctrine in the pretrial phase of a criminal prosecution were recently explored by the Sixth Circuit, sitting en banc, in *United States* v. *Andrews*, *supra*. The majority dealt with those practical problems by prescribing a high threshold requirement for defendants seeking to

All of the other circuits that have considered what showing the prosecutor must make to rebut an allegation of "vindictiveness" would accept the explanation provided by the prosecutor in this case. The result reached by the Fourth Circuit here is in direct conflict with the other circuits. In the Fifth Circuit, for example, "the prosecutor may rebut * * * prima facie proof [of vindictiveness] by establishing [that] his reasons for adding the * * * new charges were other than to punish a pesky defendant for exercising his legal rights." *Hardwick* v. *Doolittle*, 558 F.2d 292, 301 (1977). The Fifth Circuit added that "explanations which would negate vindictiveness could include mistake or oversight in the initial action, *a different approach to prosecutorial duty by*

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establish a prima facie case of vindictive prosecution (633 F.2d at 454-455) and by affording prosecutors substantial latitude to rebut prima facie showings of vindictiveness (*id.* at 456). In his dissenting opinion in *Andrews*, Judge Merritt warned of the dangers of an expansive interpretation of the vindictiveness doctrine in this context (*id.* at 459):

> During the pretrial and trial process, the prosecutor must decide what position to take on an endless variety of procedural, evidentiary, substantive and tactical questions. He may oppose motions to suppress evidence or for the appointment of counsel or refuse to agree to discovery, severance, bail, or plea bargaining. * * * Once a defendant has successfully asserted a particular legal right in the course of the criminal process * * * is the prosecutor arguably guilty of unconstitutional vindictive conduct * * * each time the prosecutor thereafter takes a position contrary to the interests of the defendant?

In view of this practical concern, Judge Kennedy concluded (*id.* at 461) that courts should "find very few cases in the pre-trial stage in which the prosecutor's conduct appear[s] impermissibly to retaliate for the defendant's exercise of a constitutional right * * *."

the successor prosecutor, or public demand for prosecution on the additional crimes allegedly committed. The list is intended to be illustrative rather than exhaustive." *Ibid.* (emphasis supplied). Accord, *Jackson* v. *Walker*, 585 F.2d 139, 148-149 & n.20 (5th Cir. 1978); *Miracle* v. *Estelle*, 592 F.2d 1269, 1276-1277 & n.14 (5th Cir. 1979) (noting that "[a]n increase in the severity or number of charges if done without vindictiveness may be easily explained").

The Second Circuit also recognizes that a different approach by a successor prosecutor is sufficient to rebut a charge of vindictiveness. See *United States* v. *Ricard*, 563 F.2d 45, 48 (1977) ("Another attorney had originally handled the case and filed the information charging a misdemeanor. The case was later assigned to [a successor prosecutor], and when she reviewed the file several weeks before the trial date, she realized that the facts warranted adding a felony charge"). Similarly, the Sixth Circuit sitting en banc recently has held that increased charges may be justified simply because the prosecutor who obtained the original charges "was inexperienced" and failed to recognize the appropriateness of additional charges. *United States* v. *Andrews*, *supra*, 633 F.2d at 456.

The Ninth Circuit has held that a prosecutor need only show "that his decision to re-indict with more severe charges was 'justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness.' " *United States* v. *Burt*, 619 F.2d 831, 836 (1980); accord, *United States* v. *Griffin*, 617 F.2d 1342, 1347 (9th Cir. 1980).[13] And the Seventh Circuit affords the prosecutor

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[13] An earlier decision of the Ninth Circuit, handed down before this Court's decision in *Bordenkircher* v. *Hayes*, *supra*, suggested in dictum that the prosecutor bears a "heavy bur-

equally broad latitude in rebutting claims of vindictiveness. See *United States* v. *Anderson*, 514 F.2d 583, 588 (1975) ("The decision to prosecute [the defendant] for the more serious offense can on its face be explained in terms other than vindictiveness * * *").

The decision of the Fourth Circuit in this case, refusing to consider the prosecutor's actual reasons for increasing the charges and requiring dismissal of those charges notwithstanding the verdict of the jury, is in direct conflict with the foregoing decisions of the other circuits. Due to the importance of the issue and the frequency with which it is litigated in the lower courts, this Court should grant the petition and resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

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den" to dispel any appearance of vindictiveness. See *United States* v. *Ruesga-Martinez*, 534 F.2d 1367, 1369-1370 (9th Cir. 1976). In that case, however, the prosecutor proffered "absolutely no evidence that justifies the increase in the charges * * *." *Id.* at 1369.